No. 15578

IN THE

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

'OSEPH ESTEN,

Appellant,

vs.

CRULES R. CHEEK, Trustee in Bankruptcy of the Estate of Joseph Esten, bankrupt,

Appellee.

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BRIEF FOR THE APPELLANT

ON APPEAL FROM THE JUDGMENT OF

THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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1680 North Vine Street
Hollywood 28, California

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BRIEF FOR THE APPELLANT

OPINION BELOW

The Order on review of the Referee's Order is attache hereto as an appendix.

JURISDICTION

The Order of the United States District Court followed petition for a review of an Order made by the Referee in Bank ruptcy in the United States District Court, Southern District c California. The Order of the United States Court was enterec

on April 4, 1957. Notice of Appeal to this court was filed April 15, which was within sixty days.

QUESTIONS PRESENTED

1. Did the United States District Court err in determining that a Declaration of Homestead, which contained an incorrect lot number but the correct tract number and the correct book number of the maps, in the office of the county recorder did not substantially comply with the statutory requirement that a Declaration of Homestead must contain a description of the premises?

2. Did the United States District Court err in determining that the Referee in Bankruptcy could not order the reformation of the Declaration of Homestead, filed by the wife of the bankrupt, which contained an incorrect lot number

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the statutes and other authorities involved are set forth in the Appendix.

STATEMENT

The facts as found by the District Court (Transcript p. 6) are as follows:

That on September 19, 1955 the appellant filed a Petiti in Bankruptcy. That in the Petition in Bankruptcy appellant listed an equity in land located at 1349 South Mansfield Street, Los Angeles. That in Schedule B-5 of the Petition in Bankruptcy the appellant claimed a homestead exemption in the afo said real property under the provisions of §1260 to 1265 inclusive of the Civil Code of California.

That on April 18, 1955, there was filed with the County Recorder a Homestead Declaration executed by the wife of the appellant. That in said declaration the real property claimed as exempt was described by lot number as Lot 104, Tract 506 as per map recorded in Book 56, pages 82 to 85 of Maps in the office of the County Recorder of Los Angeles County. That th true description of said property is Lot 204, Tract 5069 as pe map recorded in Book 56, pages 82 to 85 of Maps in the office of the County Recorder of Los Angeles County. That the appellant and his wife at the time of the filing of the Petition i Bankruptcy actually resided on Lot 204, Tract 5069. That it was the intention of appellant and his wife to declare a homestead upon said real property.

That on April 24, 1956, the Trustee filed his report of exempt property in which he refused to set aside as exempt said property, stating as the ground for such refusal that no proper Declaration of Homestead had been recorded.

Upon application to the Referee in Bankruptcy praying

for an order reforming the mistake in the description of the property to read Lot 204 instead of 104, and to allow the homestead to be set aside to the appellant, an order was made that the bankrupt is entitled to a judgment of reformation of the Declaration of Homestead executed by appellant's wife on April 18, 1955, reforming the description to read as follows: "Lot 204, Tract 5069, as per map recorded in Book 56, pages 82 to 85 of Maps in the office of the County Recorder of Los Angeles County, also described as 1349-1351 South Mansfield Avenue, Los Angeles, California." From this order, the Trustee in Bankruptcy petitioned the United States District Court for a review asking that the order be reversed. That the United States District Court, on April 3, 1957, the Hon. William C. Mathes, judge presiding, made an order reversin the order of the Referee dated December 11, 1956, in which the Declaration of Homestead had been ordered reformed. Th appeal is from the order made by Judge Mathes.

SUMMARY OF ARGUMENT

A Homestead Declaration upon which the declarant resides containing the correct tract number and map referen as recorded with the County Recorder, and the name of the city where the land is situated, is a substantial compliance with the requirement that a Declaration of Homestead shall describe the premises.

A description of land in a homestead need not be more particular than in a conveyance. Great liberality in this respect will be allowed by the courts. Parol evidence is admissible to identify the land in the event of a description containing an erroneous lot number.

A bankruptcy court has jurisdiction under its equity power to allow extrinsic evidence to be introduced to identify the homestead premises where there has been substantial compliance and to order, if necessary, reformation to confor to the intention of the declarant.

ARGUMENT

I.

THE UNITED STATES DISTRICT COURT ERRED IN DETERMINING THAT THE DECLARATION OF HOMESTEAD DOES NOT SUBSTANTIALLY COMPLY WITH THE STATUTORY REQUIREMENT THAT THE DECLARATION OF HOMESTEAD MUST CONTAIN A DESCRIPTION OF THE PREMISES

The District Court in its decision stated:

"Since the declaration of homestead filed before the petition in bankruptcy does not describe the property upon which the bankrupt resided, but instead mistakenly and clearly describes another lot in the same

tract, this declaration of homestead does not substantially comply with the statutory and necessary requirement that the declaration of homestead must contain: * * * a description of the premises, and so no notice of claim of homestead exemption was thereby given."

The District Court in a memorandum decision cited a number of cases in support of its conclusion that the declaration as filed was invalid inasmuch as it did not describe the property upon which the bankrupt resided.

A. Digest of Cases Cited by the U. S. District Court:

In the first of these cases (Harris v. Duarte, 141 Cal 497) a deed was made conveying the south 10 acres of land of a tract containing 11-1/2 acres. A house was constructed outside of the 10 acres described in the deed. A homestead was filed on this property. The Appellate Court stated that th description in the homestead was the same as the description in the deed and that it did not cover the land upon which the house was situated. The court said, "A declaration of homestead must contain a description of the premises claimed, an a statement that the person making it is residing on the premises described. If the declarant makes a mistake and gives a description of land upon which she does not reside he

statement that she resides upon the land cannot enlarge its boundaries."

The second case cited by the U. S. District Court was Carey v. Douthitt, 140 Cal. App. 409 (decided in August, 1934) The facts were that the homestead claimants owned Lots 7 and 10 of a subdivision according to a map recorded in Imperial County and resided in a house situated upon Lot 10 while the husband conducted a business on Lot 7. The wife executed and recorded a homestead upon Lot 7 alone. An action was brought to quiet title by a judgment creditor. The court in that action rendered judgment permitting the wife to execute and file an amended Declaration of Homestead to include Lot 10. An appeal was taken from that judgment. The Appellate Court in holding the original homestead to be invalid stated that the trial court could not permit the "filing of an amended declaration with retroactive effect".

The next case cited by the U. S. District Court is Donnelly v. Tregaskis, 154 Cal. 261. In that case a homestead was declared by the wife on land solely described as a "numbered lot in a numbered block in the City of Vallejo which numbered lot and block are located solely by reference to a map of said Vallejo made by C. W. Rowe, surveyor". The court in holding the homestead invalid said: "No such map was produced in evidence and the negative was shown by the defendant to the effect that no such map was of record. In the absence

of the production and identification of the map it would be impossible for any person to locate the premises sought to be described".

The next case cited by the District Court was Schyler v. Broughton, 76 Cal. 524. The description of the property to which objection was made was as follows: "The lot of land and premises situated in the Lompoc Valley, County of Santa Barbara, State of California, bounded and described as follow Being the north west quarter of subdivision number 11 as laid down on the official map of Lompoc Valley Land Company's lands, and contains forty acres of land more or less". The Supreme Court in upholding the validity of the homestead said

> "It is not necessary that a description of land in a homestead declaration should be more particular than in a conveyance."

The next case cited by the Court was Oktanski v. Burn, 138 Cal. App. 2d 419. There an action was brought to restrain the sale of certain real property under execution on the ground that the property was homesteaded. In opposition it was alleged that the homestead described the property as 740-742 Juniper Avenue or (improperly) as Lots 1877 and 187 of tract number 5134, whereas the correct description of 740-742 Juniper Avenue was Lot 7, tract 1951. In upholding the homestead the Appellate Court said:

> "Errors of description are not

infrequently discovered in conveyances and other documents relating to real property. The only purpose of a description is to reasonably identify the property intended, and the description in a homestead declaration need not be more particular than in a conveyance. To uphold homesteads which are favored by the law", says the reviewing court in Donnelly v. Tregaskis, 154 Cal. 261, "great liberality in this respect (description) will be allowed."

(Emphasis added.)

(It is to be noted that the court in the above case quoted with approval the statement "great liberality in this respect (description) will be allowed". Whereas in the earlier case of Carey v. Douthitt, supra, cited by the Distri Court, (140 Cal. App. 409), the court there had said in a case involving a wrong description: "The statutory requirements must be strictly complied with".)

The court in the Oktanski case cited the case of King Gotz, 70 Cal. 236, with approval. In that case the homestea included the whole portion of a lot the front of which was occupied by tenants. In upholding that homestead the court there said, "The claim of premises not the subject of a home stead does not invalidate his claim as to that clearly subject

to such exemption". (Citing cases.) (Emphasis added.)

The District Court also cited Rich v. Erwin, 86 Cal. App. 2d 386. In that case the homestead contains a statement the declarant is married, whereas he was not married and not the head of a family as claimed. The court held that a valid homestead had not been impressed upon the property in that th statement of an untruth relative to an essential requirement vitiates the document.

The next case cited by the Court was Johnson v. Braur 131 Cal. App. 2d 713. That case involved the sufficiency of a declaration of homestead filed by a wife upon property held in joint tenancy. Prior to the filing of the homestead the husban had conveyed his interest to the wife. The homestead did not contain the statutory statement that "she therefore makes the declaration for their joint benefit". An execution was levied on the property and the present suit to quiet title followed. Tl trial court invoked the doctrine of substantial compliance and held the above statutory phrase was not necessary to a valid declaration.

The Appellate Court in distinguishing the cases which had applied the strict construction rule affirmed the judgmen holding that the rule of liberal construction applies to a decla tion of homestead. (Emphasis ours.)

The court in that case also cited numerous substantia performance cases, notably Estate of Fath, 132 Cal. 609, 6:

Estate of Kachigian, 20 Cal. 2d 787, 791; Marelli v. Keating, 208 Cal. 528; in each of these cases a liberal construction of the homestead law and facts was adopted by the courts.

Other cases referred to by the court in the Johnson v. Brauner case, in which homesteads were upheld, under the liberal construction rule are the following:

Simonson v. Burr, 121 Cal. 582, where there was no statement that the husband was the head of the family;

Southwick v. Davis, 78 Cal. 504, where the acknowledgment omitted the phrase "whose name is subscrib to the within instrument".

Heathman v. Holmes, 94 Cal. 291, where the owner of a building afterwards built a large addition to the building which he leased for hotel purposes.

Parker v. Riddel, 41 Cal. App. 2d 908, where the wife's declaration didn't state that the husband is the head of the family.

Santa Barbara v. Ross, 183 Cal. 657, where the declaration did not state that it contains a statement that the husband has not made a declaration of homestead.

Estate of Geary, 146 Cal. 105, 108, where the land v described as a lot of 160 acres "on which I now resid with my family", then followed by an attempted description by legal subdivisions which after the land wa

surveyed was found to be incorrect.

Farley v. Hopkins, 79 Cal. 203, 206, where the statutory phrase "that she therefore makes the declaration for their joint benefit", was omitted.

In Re Statler, 114 F. S. 301, 304: Where the statement, "I estimate the actual cash value of the land and premises herein above described to be ____ ($____) Dollars" was held to be good as it meant no value.

Michels v. Burkhard, 47 Cal. App. 162, where the trial court found that it had been the actual intention of the wife when she filed the homestead to merely cloud the title for the purpose of harassing her husband.

In each of the foregoing cases the Appellate Court reaffirmed that a rule of liberal construction applies to declaration of homesteads.

B. The Liberal Homestead Construction Rule

In the Johnson v. Brauner case the court also quoted with approval the rule on liberal construction from the case of Simonson v. Burr, 121 Cal. 582, reading as follows:

> "The statute in reference to homesteads is a remedial measure and as such is to be liberally construed." And where the several acts

required "have been substantially performed, and where the declaration contains the essence of the statutory requirements, the construction should be so liberal as to advance the object of the constitution and statute."

The liberal construction rule was also stated by the California Supreme Court in Greenlee v. Greenlee, 7 Cal. 2d 579 - 583 as follows:

> "The homestead laws have always been given a most liberal construction in order to advance their beneficial objects and to carry out the manifest purpose of the legislature."

In Phelps v. Loop, 64 Cal. App. 2d 332, the Appellate Court there said:

> "The tranquility of society and the prevalence of a healthy social order are factors which much have been paramount in the legislative mind in ordaining the right of a family to hold and enjoy without let or hindrance the realty they have designated as their terrestrial abode."

In Gregg v. Bostwick, 33 Cal. 220, the Supreme Court said:

> "The [Homestead] Act is founded upon the idea that it is good for the general welfare that every family should have a home, a place

to abide in a castle where it can find shelter from financial disasters and protection against the pursuit of creditors who have given credit with the full knowledge they cannot cross its threshhold."

The above case was a suit in equity to enjoin an execut sale of property claimed to be exempt as a homestead. The plaintiff resided on a portion of a block consisting of 4 Lots. The declaration claimed "all of block 18 as a homestead". The Supreme Court affirmed the trial court's decision adjudgi that the lot upon which plaintiff was residing was exempt and that the remaining portion of "block 18" was not so impressed.

In Keyes v. Cyrus, 100 Cal. 322 - 325, it was said:

"The ultimate object of all legislation respecting the homestead is to protect the family in the right to preserve their home, both from their own improvidence, and also from the rapacity of their creditors; . . . Such statutes, being remedial in their nature, are to be construed liberally, and in favor of carrying out the manifest purpose of the legislature, rather than that their operation be restricted to the strict letter in which they are framed. The policy of such legislation has never been questioned. It is in furtherance of the welfare of the state that its

citizens shall be a permanent body, whose individual interests in its prosperity and development shall, as far as possible, be identified with the public interest."

The liberal construction rule is also discussed and upheld in Feintech v. Weaver, 50 Cal. App. 2d 181. In that case the declarant filed a homestead form provided for a "head of the family. The declarant was not the head of a family. On appeal the court held that the declaration should be given a liberal construction; that the recital is surplusage and unnecessary; and that there was a valid homestead upon the property. The court added:

> "To give this effect to the instrument secures to the defendant the right to a home which the Constitution of our state (Article XVII, §1) enjoins the Legislature to protect."

In Parker v. Riddell, 41 Cal. App. 2d 908, the court says:

> "Such statutes (homestead) are benevolent and remedial in character and may be liberally construed."

Beaton v. Reid, 111 Cal. 484, where the court said, "the statute providing for and protecting the homestead right is to be construed strongly in favor of its protection".

In Oktanski v. Burn, 138 Cal. App. 2d 419, the Appellate Court in rejecting the contention that the homestead was defective because there were two complete descriptions of two entirely different properties, said:

> "To adopt appellant's reasoning, however, would tend to defeat rather than to advance their beneficial objects and to carry out the manifest purpose of the Legislature."

In Johnson v. Brauner, 131 Cal. App. 2d 713 - 714, the court said:

> "Of course it was necessary for the legislature to provide some manner by which one desiring to claim a homestead should make a public declaration of the fact, and designate the particular premises intended to be so claimed. But surely statutory provisions to that end should not be subjected to the rule of strict construction. Statutes for the purpose of carrying out the constitutional command are remedial, and should be liberally, or at least fairly and reasonably, construed. The homestead right is not one to be industriously pinched, and circumscribed, and circumvented, and beaten back. If the facts of an honest homestead claim be present, a substantial compliance with statutory

provisions about making the claim public should be deemed sufficient. And at page 508: 'When these several acts have been substantially performed, and when the declaration contains the essence of the statutory requirements, the construction should be so liberal as to advance the object of the constitution and the statute.' The policy underlying all homestead legislation, whether providing for the selection of a homestead by a person during his lifetime or by the court for his family after his death, is as stated in Estate of Fath, 132 Cal. 609, 613, 'to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors', and to this end a liberal construction of the law and facts will be adopted by the courts. (Estate of Kachigian, 20 Cal. 2d 787, 791, 128 Pac. 2d 865) This phrase a liberal construction of the law and facts will be adopted by the courts (or

its equivalent) also occurs in Lucci v. United Credit & Collection Co., supra, 220 Cal. at 496 and Marelli v. Keating, 208 Cal. 528, 531, 282 Pac. 793."

In the instant case, it is not disputed that the Declarati of Homestead correctly describes the property by its tract number 5069; that the Declaration correctly refers to the map and book wherein this tract is recorded in the office of the County Recorder of Los Angeles County, and that the appellan and his wife were actually residing on the property when the Declaration was filed.

In the following cases, homesteads have been upheld a to that portion of the land upon which the homestead was situated, although the Declaration of Homestead referred to a larger area.

In a case entitled In Re Crowey, 71 Cal. 300, a homestead was claimed on a tract containing 185 acres. The dwelling house occupied 5 acres. The adjoining 180 acres was leased. The Supreme Court held that there should have been set aside as a homestead the house in which the declarants resided together with 5 additional acres.

In Guernsey v. Douglas, 171 Cal. 329, a homestead was filed on five lots and the court held the homestead was valid as to one of the lots.

Similarly, in the case of Ornbaum v. His Creditors,

61 Cal. 455, a homestead was claimed on "about 1100 acres". The trial court found that the plaintiff with his family resided on said lands at the time he filed said homestead declaration; that he inclosed with a fence about 300 acres thereof; that subsequently three or more persons took up preemption claims of 160 acres, each within the boundaries claimed as a homestead. On appeal, it was objected that the declarant had no actual residence on the land outside of his enclosure. The trial court upheld the homestead, and on appeal the judgment was affirmed.

C. It Is Not Necessary That a Description of Land in a Homestead Declaration Should Be More Particular Than in a Conveyance.

In the case of In Re Ogburn, 105 Cal. 95, it was conten the Declaration of Homestead was void because it described "1 property". The description was as follows:

> "Situated on Main Street of the Village of Woodland and being the western part of Lot No. 5 of said Village, etc."

The objection was made that the description was insufficient a there is nothing to show the location of Lot 5 and there might be many lots 5 in Woodland. The Supreme Court said:

> "This contention cannot be maintained. The declaration stated that the family then

resided upon the lot and premises sought to be erected into a homestead; and this statement, together with the description which followed, clearly enough designated the premises intended to be claimed as such homestead. This was sufficient." (Emphasis added.)

In Perry v. Ross, 104 Cal. 15, 19, the court said:

"That which is covered by the exemption is the land and not any particular claim to it."

§2077 of the Code of Civil Procedure in part provides as follows:

"Sec. 2077. The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first-mentioned particulars . . .

6. When the description refers to a map, and that reference is inconsistent with

other particulars, it controls them if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars."

In Stanley v. Green, 12 Cal. 148, at p. 165, the court said:

"A designation of the tract by a particular name or number is sufficient; and if it can be rendered certain by extrinsic evidence, this is as good a description as one by metes and bounds. It is undoubtedly essential to the validity of a conveyance, that the thing conveyed must be described so as to be capable of identification, but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence."

In the Estate of Geary, 146 Cal. 105 - 108, in the Declaration of Homestead the land is first described as "a lot of 160 acres on which I now reside with my family in San Dieg County, California", and then followed an attempted descripti by legal subdivisions, which after the land had been surveyed by the United States Government was found to be incorrect. Tl description continued as follows: "Said homestead known by the name of Geary's Ranch", etc.

The Supreme Court, in upholding the homestead, said:

> "This description by name designated with sufficient certainty the premises intended to be covered by the Declaration of Homestead; and the other erroneous descriptions by legal subdivisions may be disregarded. . . . We think, therefore, that the point that the Declaration of Homestead is void for want of sufficient description of the homestead premises is not tenable."

In Spect v. Gregg, 51 Cal. 198, it was contended the following description in a deed was insufficient, to wit:

> "An undivided two-thirds part of the following described tract or parcel of land, to wit: 2 Spanish Leagues of land on the west bank of the Sacramento River, part of the land formerly known as the Colus Tract, including the Town of Colusa . . . "

On appeal, the Supreme Court held that the deed did contain a sufficient description of the land in controversy, "the same being part of the Town of Colusa".

In Haley v. Amestoy, 44 Cal. 132, the principal quest in the case arose upon the construction to be given to the description of premises found in a certain deed. The descrip tion was as follows:

> "All the undivided two-thirds of all the

lands known by the name of Rancho de San Vicente lying and being situated in the County of Los Angeles and State of California."

Then followed a description by courses, distances and monuments which was erroneous. In holding that the dominant idea in the mind of the grantor when the deed was made was of the Rancho de San Vicente as a whole and not of the particular lin or marks by which it might be described, the court said:

> "This being so, the deed must be held to convey two-thirds of the whole Rancho, however erroneous may be the particular description."

In Brusseau v. Hill, 201 Cal. 225, a deed was questio among other grounds on the ground it contained no description of the property intended to be affected thereby. The language the deed was: "This is my gift of deed all in my possession t Mr. G. W. Brusseau." In holding the deed to be valid, the Supreme Court said:

> "According to the modern current of authority both in this and other jurisdictions, descriptions of property similar in general terms to that embraced in the foregoing language of the instrument under review have been held susceptible of identification by extraneous evidence, and when so identified sufficient to uphold the

attempted transfer. In the case of Lick v. O'Donnell, 3 Cal. 59 (58 Am. Dec. 383), a conveyance of 'one-half of my lot' was upheld upon proof that the grantor owned but one lot in San Francisco, and the instrument was held to convey title to an undivided one-half of such lot. In the case of Pettigrew v. Dobbelaar, 63 Cal. 396, the description was 'all land (of grantor) and wherever the same may be situated' and the instrument though executed in Illinois, was held to cover and convey land owned by the grantor in California. In the case of Staples v. May, 3 Cal. Unrep. 250 (23 Pac. 710) the description was 'all lands and personal property . . . belonging to said party . . . in Santa Clara county', and it was held that extraneous proof might be offered to locate the lands conveyed within said county. In 9 Cal. Jur., page 306, these and certain other cases are reviewed as upholding the view that 'descriptions of land, general in character, such as "all land and real estate" of the grantor "wherever the same may be situated", or "the land owned by the grantor" in a certain county, or all the grantor's

"right, title and interest" in a certain city, etc. are good and pass the grantor's interest in all his real property coming within the description.' In Ruling Case Law, volume 8 page 1076, the rule is thus stated: 'Usually general descriptions, such as "all the estate both real and personal of the grantor", "all my land" in a certain town, county or state, "and my land wherever situated", "all my right, title and interest in and to my father's estate at law", and the like, are held good. And a deed is not void merely because it conveys all one's property in general terms.' The evidence in the instant case fully showed that the piece of real estate described in the complaint herein was the only property which Charles Kruse owned in the city of Oakland, and also fully identified it as the property intended to be covered by the instrument in question. We are therefore of the opinion that said instrument was thus shown to be sufficient in the matter of description to convey to the plaintiff title to the said property."

See also 55 A. L. R., p. 162, where numerous other cases are cited holding a deed describing the subject matter

as all of the grantor's property in a certain locality as not defective or void for want of a sufficient description.

By analogy the declaration in this case in part describe the homestead as follows:

> "I am now residing with my family, consisting of my husband, on the land and premises located in the City of Los Angeles, County of Los Angeles, State of California . . . "

In Leonard v. Osburn, 169 Cal. 157, an action was brought to quiet title. The deed through which defendant claim title erroneously referred to a certain map. In upholding the deed the Supreme Court said:

> "A deed is not void for uncertainty because of errors or inconsistency in some of the particulars of the description."

See also Crouse v. Rogers, 33 Cal. App. 246, where b a contract and a map were incorrectly described, yet the cou upheld a conveyance.

In Patch v. White, 117 U. S. 210, the Supreme Court held that latent ambiguity is explainable by extrinsic evidence where a misdescription consists of a lot not intended to be des nated.

See also other cases to the same effect cited in 94 A. I R. 148.

Applying the law enunciated in the above cases, if it be assumed that a description of land in a homestead need not be more particular than in a conveyance, that the Declaration of Homestead in this case would be valid without the particular description, and that the general description, to wit, identifying the homestead as the land and premises located in the City of Los Angeles on which the declarant is now residing, would be sufficient without further specific description. Particularly would this be so under the liberal construction rule, where the land was also described by its tract number and map.

Again, it is to be noted that §1263 of the Civil Code does not require a legal description. That a legal description is not so required is firmly established by the case of Oktanski v. Burn, 138 Cal. App. 2d 419, wherein a Declaration of Homestead was upheld although it contained an incorrect legal description but a correct description by street and number.

In Murray v. Tulare, 120 Cal. 311, the court said:

> "When property has a descriptive name it may be conveyed by that name and defects in other parts of the description may be disregarded."
>
> (Citing 1092 Civil Code and other cases.)

To the same effect Martin v. Lloyd, 94 Cal. 195, 203.

In Reed v. Spicer, 27 Cal. 57: Holding that if a deed recites two descriptions, one of which sufficiently identifies

the property while the other is false, the false description should be rejected.

In Henderson v. Henderson, 85 Cal. App. 2d 476, 480, the Appellate Court said:

> "The description of real property in the complaint" . . . equity in real property situated in Shasta County, California, and standing in the joint names of the plaintiff and defendant "would be a sufficient description for a deed."

In Cornett v. Creech, (1907) 30 Ky. L. Rep. 1265, 10(S. W. 1188, the court said:

> "It is true that, in the construction of deeds, particular or specific descriptions will control a general description, but this rule cannot be invoked when the particular description is evidently incomplete and defective, as in the deed before us. When it is apparent that a call from a deed has been omitted, or is set down erroneously, the court will read into the deed the omitted call, or correct the erroneous one, so that effect may be given to the intention of the parties, and the result intended by them be accomplished."

II.

THE DISTRICT COURT ERRED IN DETERMINING THAT THE REFEREE'S ORDER DATED DECEMBER 11, 1956 REFORMING THE DECLARATION OF HOMESTEAD COULD NOT BE REFORMED

Thus far in this brief it has been the contention of the appellant that the homestead was valid notwithstanding the Declaration contained an incorrect lot number, for the reason that the Declaration did contain the correct tract number and the correct book and page number of the map in the County Recorder's office.

In fact, there has actually been no adjudication that the homestead before it was reformed was void. The appellant proceeding on the assumption that an order would be signed sustaining the trustee's refusal to set aside the property claim to be exempt petitioned the referee for an order of reformation. The petition was granted and a judgment signed reforming the declaration of homestead.

The District Court held that "it is not possible under the California law to reform retroactively a defective declaration of homestead, which mistakenly failed to comply with statutory requirements into a valid declaration of homestead."

The court relied upon Carey v. Douthitt, 140 Cal. App. 412, Harris v. Duarte, 141 Cal. 497 and Gross v. Strelitz, 54 Cal. 640, also §3399 Civil Code.

In Carey v. Douthitt, supra, as stated earlier in this brief, the Appellate Court held that the trial court could not permit the "filing of an amended declaration with retroactive effect".

Language used by the Appellate Court in that case, which was decided in 1934, is in conflict with other decisions rendered by both the California District Court of Appeal and its Supreme Court.

In Oktanski v. Burn, 138 Cal. App. 2d 419, the District Court of Appeal, in January 1956, adopted with approval a statement appearing in the case of Donnelly v. Tregaskis, 154 Cal. 261, reading "great liberality in this respect (description) will be allowed". The Appellate Court also said, "The only purpose of a description is to reasonably identify the property intended and the description in a homestead declaration need not be more particular than in a conveyance". (Emphasis added.)

The California Supreme Court refused to disturb this decision denying the appellant's petition for a hearing.

In the Carey v. Douthitt case the court also said, "The sufficiency of a declaration must be determined from the statements expressly made therein and cannot be affected by any secret intentions which may have been in the mind of the claimant".

If, as the court has stated in the Oktanski case, a

description in a homestead need not be more particular than in a conveyance, clearly the decision in the Carey v. Douthitt case would be in conflict with not only the Oktanski case but with the numerous other decisions cited by the appellant in this brief, holding that a description of land containing a latent ambiguity is explainable by extrinsic evidence. There are numerous cases which hold that the parol evidence rule is applicable to homesteads. This line of cases was apparently not taken into consideration by the courts in either the Carey v. Douthitt case or the case of Harris v. Duarte. In that case which was relief upon by the District Court, the homestead wa constructed outside of the land described in their deed.

The Referee in this case in granting the petition for reformation, signed findings that the true description of the property is Lot 204, Tract 5069 etc., that it was the intention of the appellant and his wife to declare a homestead upon the real property; that the bankrupt and his wife have substantiall complied with the provisions of the Civil Code. The Referee also, as conclusions of law, concluded that the bankrupt was entitled to a judgment of reformation of the declaration of homestead reforming and correcting the description according to the real intent of the parties.

In the following cases it was held that parol evidence was admissible in order to correct an erroneous description:

A. The Parol Evidence Rule is Applicable to Homesteads.

In Re Kossack, 113 F.S. 884, the Referee found that the declarants did not place their signatures at the end of the purported Declaration of Homestead, and refused to accept any evidence as to the intent or purpose with which the purported declarants placed their signatures in the spaces provided a the end of the verification.

In reversing the Referee's Order, the Court of Appeal said:

> "Since validity of the . . . (declaration) is the fact in dispute, the plainly declared exception to the parol evidence rule operates to render admissible evidence . . . other than the contents of the writing." California Code of Civil Procedure, §1856; see Turnbeaugh v. Santos, 146 Fed. 2d 168; in Re Shepardson, 28 Fed. 2d 353, once the instrument passes the test of the "four corners" rule and is held competent to be received.

In Steward v. U.S., 316 U.S. 353, the Supreme Court said:

> ". . . courts have repeatedly resorted to evidence of what was commonly known and called a ranch, or lot or other place in order

to correct erroneous boundaries stated in a deed description . . . "

To same effect Carter v. Bacigalupi, 83 Cal. 187, 193. Redd v. Murry, 95 Cal. 48.

In Reamer v. Nesmith, 34 Cal. 624, the court says:

". . . it was competent to ascertain by extrinsic evidence the precise location of the land in dispute and also the several calls or description in the deed."

§3541 of the Civil Code provides as follows:

"An interpretation which gives effect is preferred to one which makes void."

To same effect Blume v. MacGregor, 64 Cal. App. 2d 244.

§1070 of the Civil Code provides as follows:

"Irreconcilable provisions. If several parts of a grant are absolutely irreconcilable the former part prevails."

The primary objective of all interpretations of a conveyance is to ascertain and give effect to the intention of the parties (9 Cal. Jur. 245 S. 119).

Blume v. MacGregor, 64 Cal. App. 2d 244:

"An omission of part of the boundaries or calls is not fatal to the validity of a deed where such boundaries or calls can be supplied

or the description rendered certain."

Prudence v. Geist, 316 U. S. 88:

B. The Bankruptcy Court Has Jurisdiction Under Its Equity Power to Order Reformation of a Homestead Where the Referee in Bankruptcy Finds There Has Been Substantial Compliance with the Homestead Requirements

"The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed * * * A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest." (Citing Securities v. U. S., 310 U. S. 434-455.)

In contrast it is the bankrupt's contentions that the ho stead Declaration although imperfect in description, was vali under the liberal construction doctrine of the homestead case and, secondly, that the Referee did have plenary power over the assets of the bankrupt, and in the exercise of such power was authorized to permit the bankrupt to correct an error in

the description of property claimed to be exempt so as to remove the lien of the Trustee in Bankruptcy from said property where there had been substantial compliance with the homestead requirement as to description.

Remington on Bankruptcy, Vol. 5(a), p. 397 states the following:

> "The Bankruptcy Court as a court exercising equitable jurisdiction may apparently in proceedings, marshal liens and determine rights in property in its custody, decree such equitable relief as the circumstances call for and warrant. Thus it may reform instruments."
>
> Remington on Bankruptcy, Vol. 5(a), p. 408, citing Fowler v. Hart, 14 Law Ed. 186, (13 How. 373).
>
> Re: Traymore Shops, 300 Fed. 245.

It may determine homestead rights.

Moody v. Savings, 239 U. S. 374.

In Fowler v. Hart the bankruptcy court permitted a mortgage to be reformed. On appeal this procedure was objected to. The Supreme Court passing on this objection sai

> "The District Court had jurisdiction of the matter and it is but the ordinary exercise of the power of the court of chancery

to reform a mortgage or other instrument so as to effectuate the intention of the parties." (Emphasis added.)

In Hanlon v. Western Loan, 46 Cal. App. 2d 580, the court said:

> "Reformation was proper to reform a description in a deed of trust and in all of the subsequent documents which had perpetuated the error."

In Gardner v. Johnson, 195 Fed. 2d 717, the Court of Appeal said:

> "The Bankruptcy Act declares the policy of Congress to give effect to state exemption laws, but once bankruptcy has intervened, the time, manner and condition under which such exemptions may be claimed as against the trustee, are matters of federal law and are determined by the Bankruptcy Act."

It is respectfully submitted that the Referee did have jurisdiction to reform the description in the homestead, after determining that there was substantial compliance with this requirement, that parol evidence was properly received by the Referee to identify the correct lot number, and that finally that portion of the homestead which contained the incorrect lot number could be properly disregarded by the Referee.

For all of the foregoing reasons, the appellant respectfully submits that the Order made by the United States District Court is erroneous and should be reversed.

Respectfully submitted,

PHILL SILVER,

Attorney for Appellant.

APPENDIX "A"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

In the Matter of JOSEPH ESTEN, Bankrupt.	) NO. 68,324-WM In Bankruptc)) ORDER ON REVIEW OF) REFEREE'S ORDER OF) DECEMBER 11, 1956) REFORMING A DECLARATIO OF HOMESTEAD

[Filed April 3, 1957, Clerk, U.S. District Court, Southern District of California, by C. A. Simmons, Deputy Clerk.]

Upon the petition for review filed by the trustee on December 19, 1956; upon the certificate of the Referee Benno M. Brink, filed January 9, 1957; and upon the proceedings had before the Referee as appear from his certificate; and it appearing to the court that:

(1) "the [homestead] exemption here in question is defined by California law . . . [and] the Bankruptcy Act declares the policy of Congress to give effect to state exemption laws" [Gardner v. Johnson, 195 F. 2d 717, 719 (9th Cir. 1952); Lynch v. Stotler, 215 F. 2d 776, 778 (9th Cir. 1954); 11 U.S.C. §24];

(2) since the declaration of homestead filed before the petition in bankruptcy does not describe the property upon which the bankrupt resided, but instead mistakenly and clearly describes another lot in the same tract, this declaration of homestead does not substantially comply with the statutory and necessary requirement that "the declaration of homestead must contain: * * * a description of the premises" [Cal. Civ. Code §1263]; and so no notice of claim of homestead exemption was thereby given [Harris v. Duarte, 141 Cal. 497, 75 Pac. 58 (1903); Carey v. Douthitt, 140 Cal. App. 409, 35 P. 2d 632 (1934); see also: Donnelly v. Tregaskis, 154 Cal. 261, 97 Pac. 421, 422 (1908); Schuyler v. Broughton, 76 Cal. 524, 18 Pac. 436 (1888); Oktanski v. Burn, 138 Cal. App. 2d 419, 291 P. 2d 386, 194 P. 2d 809, 812 (1948); cf: Johnson v. Brauner, 131 Cal. App. 2d 713, 281 P. 2d 50, 56 (1955); In re Kossack, 113 F. Supp. 884 (S. D. Cal. 1953)];

(3) inasmuch as the trustee in bankruptcy is "vested by operation of law with the title of the bankrupt as of the date of the filing of

the petition" in bankruptcy [11 U. S. C. §110], the trustee's interest in the bankrupt's property cannot be altered by the filing of a declaration of homestead under California law after the petition in bankruptcy has been filed; hence the second declaration of homestead at bar, filed by the bankrupt's wife as owner of an undivided one-half interest in the bankrupt's residence, could not affect the trustee's undivided one-half interest in the bankrupt's residence [Schuler-Knox Co. v. Smith, 62 Cal. App. 2d 86, 144 P. 2d 47 (1943); Sampsell v. Straub, 194 F. 2d 288 (9th Cir. 1951), cert. denied, 343 U. S. 927 (1952)]; and

(4) it is not possible, under the California law, to reform retroactively a defective declaration of homestead, which mistakenly failed substantially to comply with statutory requirements, into a valid declaration of homestead [Carey v. Douthitt, supra, 140 Cal. App. at 412, 35 P. 2d at 633; see Harris v. Duarte, supra, 141 Cal. 497, 75 Pac. 58; Gross v. Strelitz, 54 Cal. 640 (1880); cf. Cal. Civ. Code §3399].

IT IS ORDERED that the Referee's order under review dated December 11, 1956, reforming the first declaration of

homestead, is hereby reversed.

IT IS FURTHER ORDERED that the Clerk this day serve copies of this order by United States mail on

(1) Referee Benno M. Brink;

(2) the attorney for the Trustee; and

(3) the attorney for the Bankrupt.

April 3, 1957.

Wm. C. Mathes
United States District Judge